

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Creation of a Low Power Radio Service)	MM Docket No. 99-25
)	
Amendment of Service and Eligibility Rules for)	MB Docket No. 07-172
FM Broadcast Translator Stations)	RM 11338
)	
To: The Commission		

COMMENTS

Northeast Broadcasting Company, Inc. ("NEBCO"), by its attorneys, hereby submits these Comments in response to the Third Further Notice of Proposed Rulemaking issued by the Commission in the above-referenced proceeding on July 12, 2011 (the "NPRM").¹ In the NPRM, the Commission proposes to dismiss all FM translator ("FX") applications in spectrum-limited radio markets where the total number of available channels is less than the per-market channel floors proposed by the Commission for low power FM services ("LPFM"). NEBCO, which has applied for new FM translator stations in a spectrum-limited market according to the Commission, urges the Commission to replace its current proposal with a spectrum allocation policy that divides available channels in spectrum-limited markets equally between FX and LPFM services. This balanced approach more faithfully adheres to the language of Section 5 of the Local Community Radio Act of 2010 ("LCRA"),² better serves the interests of fairness and

¹ *Creation of a Low Power Radio Service et al.*, Third Further Notice of Proposed Rulemaking, FCC 11-105 (rel. July 12, 2011).

² Pub. L. No. 111-371, 124 Stat. 4072 (2011). Section 5 states as follows:

procedural integrity, and offers opportunities both to new FM translators and LPFM stations. In support thereof, NEBCO states as follows.

NEBCO has four applications for FX construction permits in the Boston radio market currently pending before the Commission.³ These applications have been pending since the initiation of the 2003 Auction No. 83 FX window. Under the NPRM proposal, all of NEBCO's FX applications must be dismissed, as the proposed LPFM channel floor for Boston, a top twenty market, is eight channels, and the Commission has identified zero channels currently available in the Boston market for LPFM services.⁴ Applicants across the country similarly face dismissal of legitimate FX applications pursuant to the Commission's proposed policy. While NEBCO understands and applauds the Commission's desire to promote LPFM services, as well as the legislation leading to such a determination, particularly in major markets, the promotion of such services at the expense of new FX services, which were initially sought eight years ago, runs counter to the Commission's commitment to fairness and procedural integrity as well as the plain text of Section 5 the LCRA.

The Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that –

- (1) licenses are available to FM translator stations, FM booster stations, and low-power FM stations;
- (2) such decisions are made based on the needs of the local community; and
- (3) FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified FM stations.

³ See File No. BNPFT-20030317JRJ, File No. BNPFT-20030317JQR, File No. BNPFT-20030317JQI and File No. BNPFT-20030317JPW.

⁴ See NPRM at ¶ 26, Appendix A.

In the past, the Commission has recognized that FX stations as well as LPFM stations provide important local service and sought to balance their competing claims to limited spectrum accordingly.⁵ For example, in adopting the 10-application limit for FX applicants in the wake of the 2003 FX window, the Commission determined that such a limit would "appropriately balance the equitable interests of [affected FX applicants] against important LPFM licensing goals and policies."⁶ NEBCO submits that this balance between the equitable interests of FX applicants and LPFM licensing goals and policies is nowhere to be found in the Commission's current proposal. Applicants such as NEBCO filed their FX applications in good faith in 2003 and had expected, at some point during this eight year period, that the Commission would engage in a competitive bidding proceeding to determine which mutually exclusive party would receive a construction permit. The dismissal of these applications in 2011, after eight years of Commission inaction, and without a single proposed mechanism offering frustrated FX applicants some alternative opportunity to continue pursuing their interest in local FX operations, is incompatible with the equitable interests of the pending FX applicants as well as the integrity of Commission procedure. Abruptly dismissing scores of legitimate applications after years of Commission handwringing over the fate of those applications will do little to boost confidence in the integrity and reliability of the Commission's process.

And the LCRA provides no cover whatsoever for such drastic Commission action. As noted by the Commission, Section 5 of the LCRA can be interpreted to require that *new*

⁵ See, e.g., NPRM at ¶ 2 (citing *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12442 (2004) ("Recognizing that both LPFM stations and translators provide valuable service, what licensing rule changes should the Commission adopt to resolve competing demands by stations in these two services for the same limited spectrum?")).

⁶ NPRM at ¶ 3.

spectrum licensing opportunities be made available to both LPFM and FX applicants.⁷ In fact, NEBCO submits that this is the only sensible interpretation of Section 5. To begin with, the first clause of Section 5 explicitly states that the Commission, "when licensing *new* FM translator stations, FM booster stations, and low-power FM stations, shall..." (emphasis added). In other words, the "licenses are available," "needs of the local community," and "equal in status" standards set forth in Sections 5(1)-(3) of the LCRA are part of the broader, encompassing mandate that contemplates new licenses for each of these competing FM services. The "equal in status" language included in Section 5(3) directly reinforces this common sense reading of Section 5.⁸ Moreover, as discussed above, the Commission has a well-documented history of trying to balance the competing spectrum interests of LPFM and FX applicants. The complete exclusion of FX applicants from new licensing opportunities in most major markets, as proposed in the NPRM, contradicts the plain language of Section 5 and marks a significant departure from the Commission's own precedent.

If Congress wanted the Commission to invoke the disparity in existing FX and LPFM stations as justification for foreclosing all future FX opportunities, surely it would have said so directly and explicitly, given the drastic nature of such an action. It would have been quite simple for the Congress to have mandated that as of the date of enactment of the LCRA, that the

⁷ See NPRM at ¶ 11.

⁸ In response to the Commission's inquiry, NEBCO submits that, yes, dismissal of all FX applications in spectrum-limited markets without any alternative for FX applicants to avail themselves of new FX licensing opportunities violates the "equal in status" language of Section 5(3). See NPRM at ¶ 12. See also *Letter from The Honorable Greg Walden, Chairman, Subcommittee on Communications and Technology, U.S. House of Representatives and The Honorable Lee Terry, Vice Chairman, subcommittee on Communications and Technology, U.S. House of Representatives, to The Honorable Julius Genachowski, Chairman, Federal Communications Commission* (Mar. 14, 2011).

Commission not grant any future FM translator construction permits unless there were more than adequate spectrum opportunities for new LPFM stations; however, it did not do so. Acting on Section 5's contemplation of new licenses for each FM service and interpreting "equal status" as an affirmation of the Commission's efforts to continue balancing FX and LPFM interests is a far more accurate interpretation of Section 5 than one that the Commission was delegated the authority to forcibly reshape the FM spectrum landscape by dismissing scores of long-delayed applications and denying those applicants any possible recourse for their lost opportunities and investments. In the NPRM, the Commission concedes that processing subsequently-filed LPFM applications before prior-filed FX applications would technically run afoul of the Commission's cut-off rules, and that waiver of such rules would likely be impermissible under the "equal in status" provision in Section 5(3) of the LCRA.⁹ If the Commission believes that the LCRA's "equal in status" mandate prevents waiving the cut-off rule, it makes little sense for the Commission blithely to embrace the wholesale dismissal of FX applications, an action which obviously undercuts the spirit if not the precise letter of the rule. NEBCO submits that it is arbitrary and capricious to interpret Section 5(3) as prohibiting technical infractions of Commission rules while simultaneously sanctioning a policy that guts the animating purpose of those same rules and policies.

Finally, NEBCO wishes to make note that the dismissal of long-pending applications is inconsistent and at variance with prior actions taken by the Commission when it has modified application procedures. For example, in the *Second Report and Order* in MM Docket No. 95-31, 18 FCC Rcd 6691 (2003), the Commission, among other actions, proposed to dismiss 19 mixed

⁹ See NPRM at ¶ 20. See also 73.807(d) (cut-off rules).

groups of applications on the basis that non-commercial educational applicants were not subject to selection by competitive bidding and, as a result, would not be permitted to participate in the auctions for the non-reserved band FM channels they had previously filed applications for. Upon reconsideration, the Commission reversed its initial determination and, recognized "the unfairness of immediate dismissal to this group of long-pending applications for NCE stations outweighs any delay to those applicants for commercial stations that are mutually exclusive with these applicants." *Memorandum Opinion and Third Order on Reconsideration* in MM Docket No. 95-31, 23 FCC Rcd 17423, 17428 (2008). Instead of dismissing the mixed groups, the Commission gave the NCE applicants the opportunity to amend their applications to commercial status and, upon doing so, to then participate in a competitive bidding process for the broadcast channel they had originally sought. *Id.* The Commission, in adopting the revised procedure, concluded: "This approach will avoid the harsh result of dismissing applicants based on subsequently adopted processing rules in a manner that is inconsistent with the Act and our commercial and NCE licensing scheme. *Id.* Those words are equally applicable in this instance and call for the Commission to come up with a mechanism that does involve the "harsh result" that the Commission is now proposing of dismissing entire groups of applicants that have waited nearly as long as the parties in the mixed group proceedings and, instead, adopting a procedure that enables them to have some opportunity to secure the broadcast facilities they long sought. NEBCO is offering a proposal for achieving such a fair and equitable approach, consistent with applicable precedent.

As an alternative to the drastic measure proposed by the Commission, NEBCO proposes splitting available spectrum in spectrum-limited markets equally between FX and LPFM

services. If one channel is available, it should be made available to LPFM applicants; if two channels are available, one channel should be made available to LPFM applicants and one to FX applicants; if three channels are available, two should be made available to LPFM applications, and one to FX applicants; if four channels are available, two should be made available to LPFM applicants and two to FX applicants; and so on. Further, the Commission should permit interested parties with pending FX applications to amend their applications to apply for any of the designated channels. In mixed groups with commercial and non-commercial applicants vying for the same spectrum, the non-commercial applicants, in accordance with the mixed-group proceeding precedent,¹⁰ should be given the opportunity to amend to commercial status and, thereby, participate in the Commission's competitive bidding procedure, or else have their applications dismissed. Of course, in situations where all parties are non-commercial applicants, the non-commercial selection rules will apply.

NEBCO's proposal that the Commission equitably divided available spectrum between FX and LPFM services in this fashion is in full accordance with the Commission's mandate under the LCRA. According to the Commission, Section 5 of LCRA mandates "licensing opportunities for both [FX and LPFM] services in as many communities as possible," and this mandate includes "some minimum number of LPFM licensing opportunities."¹¹ By adopting NEBCO's approach, the Commission can advance LPFM channel floors in radio markets without compromising the equal status of FM services. More importantly, it is neither arbitrary nor unequal, but, rather, is an equitable approach that does not advantage either applicant group and

¹⁰ See *Memorandum Opinion and Third Order on Reconsideration* in MM Docket No. 95-31, *supra* at 17428.

¹¹ NPRM at ¶¶ 7, 11.

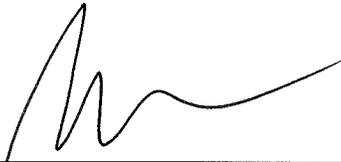
allows both groups to obtain new service opportunities without either being disadvantaged at the other's expense.

WHEREFORE, Northeast Broadcasting Company, Inc. respectfully requests that the Commission abandon its current proposal to allocate all available spectrum in affected spectrum-limited markets to LPFM services and instead equitably divided available spectrum between FM translator and LPFM services in such markets in accordance with the procedures indentified above, or in such other manner that results in neither pending FM translator applicants nor future LPFM applicants being entirely excluded from seeking channels that are available at the present time.

Respectfully submitted,

NORTHEAST BROADCASTING COMPANY, INC.

By: _____



Barry A. Friedman
Thompson Hine LLP
Suite 800
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Dated: August 29, 2011